El Charro Mexican Foods, Inc. *and* Hotel, Motel & Restaurant Employees & Bartenders Union, Local 50, Hotel and Restaurant Employees and Bartenders International Union. Case 20-CA-15286

August 7, 1981

DECISION AND ORDER

On May 5, 1981, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, El Charro Mexican Foods, Inc., Vacaville, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer to Jeff Warr immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and to his former workweek."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten our employees with closure of our business if they choose to be represented by Hotel, Motel & Restaurant Employees & Bartenders Union, Local 50, Hotel and Restaurant Employees and Bartenders International Union.

WE WILL NOT threaten our employees with discrimination against those employees who support or supported the above labor organization.

WE WILL NOT threaten our employees with closure of our business if they engage in a strike.

WE WILL NOT interrogate our employees concerning their reasons for supporting the above labor organization or their conduct in the event there is a strike.

WE WILL NOT issue reprimands or written warnings to our employees because of their activities on behalf of the above labor organization.

WE WILL NOT reduce our employees' workweeks because of their activities on behalf of the above labor organization.

WE WILL NOT discharge our employees because of their activities on behalf of the above labor organization

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the National Labor Relations Act, as amended.

WE WILL offer Jeff Warr immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previ-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge and asserts that the Administrative Law Judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. Further, we are satisfied that the allegation of bias is without merit. There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Thus we find no basis for reversing or setting aside his findings, conclusions, or recommendations.

[2] The Administrative Law Judge concluded that Respondent's reduction of employee Schwind's workweek was violative of Sec. 8(a)(3) and (1) of the Act as indicated in his Conclusion of Law 5(b). In sec. F, par. 7, of his Decision, he inadvertently erred by citing this action as a violation of only Sec. 8(a)(1), rather than Sec. 8(a)(3) and (1). We hereby correct this error.

Member Jenkins would not rely on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), because the facts show that the alleged lawful reasons for the discharges did not exist, and the *Wright Line* analysis, designed to determine causation where a lawful and unlawful reason are both genuine, is useless in the situation here.

[3] Member Jenkins would modify the recommended Order to require the interest due to Schwind and Warr be computed in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[4] In The Remedy section of his Decision, the Administrative Law Judge inadvertently recommended, *inter alia*, that Respondent be directed to reinstate Warr to his "former position" rather than to his "former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previosly enjoyed." Accordingly, we shall modify par. 2(a) of the recommended Order and issue a new notice.

ously enjoyed, and WE WILL offer him reinstatement to his former workweek.

WE WILL restore Sheryl Schwind her former workweek.

WE WILL make Sheryl Schwind and Jeff Warr whole for any losses in wages or benefits they suffered by virtue of our reducing their workweeks and discharging Warr because of their activities on behalf of the above labor organization, plus interest.

WE WILL withdraw the April 4, 1980, reprimand and April 11, 1980, warning and termination notice we issued to Jeff Warr and expunge them from our records.

EL CHARRO MEXICAN FOODS, INC.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge: On October 29, 1980,[1] I conducted a hearing at Vacaville, California, to try issues raised by a complaint issued on May 30 and amended on October 29 based upon a charge filed by the Union on April 15 and amended on May 30.

The amended complaint alleged El Charro Mexican Foods, Inc.,[2] violated Section 8(a)(1) of the National Labor Relations Act, as amended (hereafter called the Act), prior to a Board-conducted election among the Respondent's Vacaville employees, by threatening to close the restaurant if the employees selected Hotel, Motel & Restaurant Employees & Bartenders Union, Local 50, Hotel and Restaurant Employees and Bartenders International Union,[3] as their representative; that the Respondent additionally violated Section 8(a)(1) of the Act after the election by: (1) interrogating an employee regarding her union activities and threatening her with more onerous working conditions because the employees chose union representation; (2) reducing an employee's workweek because of her support of the Union; and (3) promoting a junior employee instead of a senior employee, contrary to past practice and policy, because the junior employee was an active union supporter; that the Respondent violated Section 8(a)(1) and (3) of the Act by threatening to issue a disciplinary warning to an employee, reducing that employee's workweek and discharging him, all because of his active role in the Union; and that the Respondent violated Section 8(a)(1) and (5) of the Act by changing its policies governing the issuance of disciplinary warnings and promotions without prior notice to or bargaining with the Union.

The Respondent denied it committed the alleged acts or denied they violated the Act.

The issues are whether the alleged acts occurred and, if so, whether they violated the Act.

[1] Read 1980 after all further date references omitting the year.
[2] Hereafter called the Respondent.
[3] Hereafter called the Union.

The parties appeared at the hearing and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue and file briefs. Briefs were filed by the General Counsel and the Respondent.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleges and the answer admits the Respondent, at times material, was a California corporation with an office and place of business in Concord, California; that it was engaged in the operation of public restaurants selling food and beverages, including a restaurant in Vacaville, California; that during the calendar year 1979, in the course of operating its business, it received gross revenues in excess of $500,000; that during the calendar year 1979 it purchased and received at its Vacaville restaurant products, goods, and services valued in excess of $5,000 directly from points located outside of California; and that it was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act. On the basis of the foregoing, I find and conclude at all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit and the Union's Representative Status*

The Respondent has operated a restaurant at Vacaville since 1977. In January 1980 a waitress employed there, Sheryl Schwind, contacted the Union with a view towards securing union representation of the Respondent's Vacaville employees. The Union immediately commenced an organization campaign among those employees, conducted numerous meetings with Vacaville employees, secured signed authorization cards from a substantial number of them and, in February, filed a petition with the Region for certification as their exclusive representative for collective-bargaining purposes.

The Region scheduled a February 19 hearing on the petition. The Union appeared at the hearing by Secretary-Treasurer Steve Martin, Business Representative Sandy Reshes and two of the Respondent's employees—waitresses Schwind and Jamie Mitchell. The Respondent appeared by President Jim Shields and Director of Food Services Dave Shields (the two are brothers and part owners of the Respondent). The parties stipulated to a March 19 election at the Vacaville premises within a unit consisting of all employees employed by the Respondent at its Vacaville facilities, excluding bookkeepers, managers, guards and supervisors, as defined in the Act. There were approximately 21 employees within the unit on March 19. Schwind and waitress Dena Fitzgerald acted as the Union's observers at the election. A majority of the unit employees voted for union representation.

Based on the foregoing, I find and conclude the stipulated unit is appropriate for collective-bargaining purposes within the meaning of Section 9 of the Act and since March 19, the Union has been the duly designated exclusive collective-bargaining representative of the Respondent's employees within that unit.

B. *The Alleged February 17 (Preelection) Violation*

The amended complaint alleges and the Respondent denies that on February 17, shortly after the filing of the union petition, the Respondent's Vacaville manager, Don Daniels,[4] threatened an employee with closure of the restaurant in the event the employees selected the Union as their collective-bargaining representative, thereby violating Section 8(a)(1) of the Act.

On February 17 Daniels called cook Jeff Warr into his office; told Warr he wanted to tell Warr what transpired at a meeting of the employees conducted a few days earlier which Warr did not attend; told Warr that Dave Shields spoke, telling the employees the Respondent could not afford the additional costs union representation would generate, that union representation of the employees would cause problems, that it would break up the happy family atmosphere which existed at Vacaville and would not help the employees; and stated while he knew Warr was a union supporter, if the employees voted for union representation the Respondent probably would have to close its doors.[5]

On the basis of the foregoing, I find and conclude that on February 17 the Respondent, by Daniels, threatened employee Warr with closure of the restaurant in the event the employees voted for union representation and thereby violated Section 8(a)(1) of the Act.

C. *The Alleged April 10 Violation*

The amended complaint alleges and the Respondent denies that on April 10 Dave Shields, the Respondent's director of food services and part owner,[6] threatened an employee that Respondent would impose more onerous terms and conditions of employment because the employees selected the Union as their collective-bargaining representative on March 19 and interrogated that employee concerning her support for the Union in the event a strike occurred, thereby violating Section 8(a)(1) of the Act.

As noted above, waitress Fitzgerald acted as the Union's observer at the March 19 election. On April 10, Shields approached her while she was on duty at the restaurant and expressed his shock at seeing her acting in that capacity; stated Fitzgerald had misled him, he thought she was opposed to the Union,[7] and asked her why she supported it. Fitzgerald replied she changed her mind about the Union and supported it because she wanted the same benefits the Union secured for employees of other employers. Shields stated if the employees wanted higher benefits, they should have sought work elsewhere; that the Respondent had formulated a benefits plan for the employees but since they chose union representation, the plan had been abandoned; since the Union won the election, the Respondent had to make some changes and separate the sheep from the goats.[8] Shields then asked Fitzgerald what she would do if the Union called the employees out on strike; Fitzgerald replied she did not know. Shields closed the conversation by commenting there either would be a strike or a closure of the restaurant, and a request that Fitzgerald not repeat his comments.[9]

On the basis of the foregoing, I find and conclude that on April 10 the Respondent, by Shields, threatened Fitzgerald with an implied threat to change the working conditions of union supporters, including possible separation, because of their support of the Union; with a second implied threat to close the restaurant if the employees struck in support of the Union's contractual demands; and interrogated Fitzgerald concerning her reasons for supporting the Union and her actions in the event the Union called the employees out on strike. I further find, by these actions, the Respondent violated Section 8(a)(1) of the Act.

D. *The Alleged April 4, 10, and 11 Violations*

The amended complaint alleges that on April 4 the Respondent, by Daniels, reprimanded cook Jeff Warr; that on April 10 he reduced Warr's workweek; that on April 11 he issued a written disciplinary warning to Warr; that on April 11 he discharged Warr; that all the foregoing actions were prompted by Warr's active union role; and that by those actions, the Respondent violated Section 8(a)(1) and (3) of the Act. It is undisputed that Daniels issued an oral reprimand or warning to Warr on April 4, reduced Warr's workweek on April 10, issued a written disciplinary notice to Warr on April 11, discharged Warr on April 11, and was aware Warr was an active union supporter.[10] The Respondent contends the

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[4] The amended complaint alleged, the answer admitted, and I find at all pertinent times Daniels was the manager of the Vacaville restaurant and a supervisor and agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

[5] These findings are based upon the uncontradicted testimony of Warr, who testified in a direct and forthright manner. While Daniels took the stand, he did not deny making the statements just noted.

[6] The amended complaint alleged, the answer admitted, and I find at all pertinent times Shields was a supervisor and agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

[7] In the course of a conversation between the two prior to the election, Fitzgerald assured Shields she was opposed to the Union.

[8] A Biblical allusion; normally understood to mean separation of the worthy from the unworthy, the good from the evil, the favored from the disfavored. (Brewer's Dictionary of Phrase & Fable, Harper & Row, New York and Evanston, 1970 Ed.)

[9] These findings are based primarily upon the testimony of Fitzgerald, who impressed me as an honest, forthright witness. Shields corroborated her testimony to his initiation of the conversation, his expression of chagrin at her support of the Union and his remark concerning separation of sheep from goats. Shields' wife, Laura, who testified she overheard the conversation, also corroborated Fitzgerald's testimony Shields initiated the conversation, expressed chagrin at Fitzgerald's apparent change of attitude regarding support of the Union, and that Fitzgerald told Shields she supported the Union because she wanted the benefits others received through union representation. Laura Shields contradicted both Shields and Fitzgerald concerning the separation remark. Shields described his comments as an attempt to act as a good shepherd, attempting to guide a member of his troubled flock—his admitted remarks clearly indicate, however, expression of resentment over Fitzgerald's and other employees' support of the Union.

[10] Daniels so testified.

April 4 warning was for cause; the April 11 warning was for cause; the discharge was for cause; none of those actions were taken because of Warr's union activities; therefore, the actions complained of did not violate the Act.

Warr was hired by the Respondent as a busboy in June 1979. In February 1980 he was promoted to cook.[11] At that time the Respondent employed four cooks at the facility; i.e., Warr, John Jones, Larry Grable, and Dan Lopez. Warr worked 4 days a week—Wednesday, Friday, Saturday, and Sunday—and the other three cooks worked a 5-day week. Warr was assured he would be advanced to a 5-day workweek when business picked up.

Warr became active in the Union and its campaign to organize the Respondent's employees from the outset. He attended all the meetings called by the Union among the Respondent's employees; he signed a card authorizing the Union to represent him for the purpose of bargaining collectively with the Respondent the first time an opportunity to do so arose; he openly and actively solicited support of the Union among other employees at work in the presence of management officials;[12] he was reprimanded by Brogan on more than one occasion for discussing the benefits he believed the employees would receive by union representation during working hours; he lettered the Union's designation (Local 50) on the chef's hat he wore at work and wore the hat containing the legend at work; he embraced Schwind when she came to the kitchen immediately after the ballots were tabulated on March 19, advised him the Union won the election and invited him to a victory celebration, in the presence of Shields, Daniels, Brogan, and former manager, Pat Glennen; and he was elected a member of the Union's contract negotiating committee subsequent to the election.

Prior to March 29 the Respondent neither posted nor distributed to its employees any document advising its employees at Vacaville what its policies were concerning taking time off from regularly scheduled work. Nor were the Vacaville employees advised of such policies at hire.

In November 1979, when Warr wanted a week off for vacation,[13] Respondent's then manager, Pat Glennen, informed Warr he had to secure replacements to fill in for him on the days he expected to be absent, place a notice on the bulletin board next to the posted work schedule[14] listing the names of his replacements and the dates those replacements would fill in for him and notify Glennen of his plans and arrangements. Warr secured replacements to cover his work assignments the week he planned to be absent on vacation, posted a notice listing their names and the dates they would be covering for him, advised Glennen of his plans and arrangements and went on vacation. He never was advised at any subsequent time of any change in that policy.[15]

Following the election, Warr made plans to take a vacation trip to southern California between March 29 and April 3 to visit his father. He contacted cooks Dan Lopez and Larry Grable and secured their consent to fill in for him on March 29 and 30 (Lopez) and April 2 (Grable).

On or about March 20 Brogan, Warr, and Jones were off work and engaged in "dirt biking;" in the course of their activities, Warr told Brogan of his vacation plans; Brogan asked him if he secured replacements for the days he was scheduled to work during his planned vacation period; Warr replied he had; and the two discussed what Warr planned to do during his vacation.[16] On the Wednesday prior to his leaving on vacation, Warr again discussed his vacation plans with Dave Shields, who was substituting for Daniels as manager that day. Warr told Shields of his plans; Shields commented he wished his children, who lived in southern California, would come to visit him; asked if Warr had secured replacements to fill in for him on the days he was scheduled to work during the period of his proposed vacation; and Warr replied he had, naming them. Prior to Warr's leaving the restaurant that day, Shields told him he hoped he would enjoy his vacation, jokingly advised him to be a good boy, and suggested he get a haircut before returning.[17] The last day Warr worked before leaving on vacation was March 28; on that day he posted a notice on the bulletin board naming Lopez and Grable as his replacements for the days he was scheduled to work during his planned vacation.[18]

When Warr reported back to work on April 4, Daniels told Warr he should have secured his permission before going on vacation; that if Warr had asked him, he would have denied Warr permission to go under the arrangements he made, since Warr's arrangements created hardships on the employees and difficulties for him,[19] and that he was giving Warr an official warning for taking an unauthorized vacation.

Warr replied he secured permission to go on his vacation from Brogan and Shields; that Lopez wanted to earn extra money; that he could not anticipate the problems that arose on April 1 and 2, it was Daniels' decision to assign Grable to bus rather than cook, Grable was available to cook. Daniels stated Warr did not advise *Daniels* of his plans and arrangements (Daniels was unaware of Warr's plans and arrangements until he saw Lopez at

[11] At the time he was the senior busboy.

[12] Daniels and Steve Brogan, assistant manager. The amended complaint alleges, the answer admits, and I find at all appropriate times Brogan was a supervisor and agent of the Respondent acting on its behalf.

[13] Without pay; the Respondent did not grant paid time off.

[14] The Respondent posted a work schedule at the restaurant listing the dates and hours each employee was scheduled to work.

[15] Warr's testimony to that effect was not contradicted; while Daniels testified in January he added the requirement that the absentee and his replacements affix their signatures to the notice, the evidence fails to establish Warr was notified thereof.

[16] Warr's testimony to this effect was corroborated by Jones and is credited. The two impressed me as sincere.

[17] These findings are based upon Warr's testimony, which was forthright, direct, and corroborated by Jones.

[18] I credit Warr's testimony to that effect, on the same basis I credited Warr's earlier testimony.

[19] Lopez' substitution for Warr on March 29 and 30 meant Lopez worked 7 days within that workweek, a situation Daniels wished to avoid; a busboy quit on April 1, requiring Daniels to assign Grable to bus rather than substitute for Warr as a cook on April 2, and requiring Brogan to fill in as cook.

work, substituting for Warr, on March 29, and asked Lopez where Warr was); Warr replied Daniels was not there and he discussed his plans with and secured the consent of Shields, Daniels' substitute.[20]

It is undisputed that on April 10 Daniels posted a work schedule reducing Warr's workdays from 4 to 3 days for the subsequent workweek (April 13-19). At the same time Daniels hired a fifth cook.

Warr was not assigned to and did not work on April 10. He did not become aware of the presence of a new cook and the reduction in his workweek until he reported for work on April 11. In a conference with Daniels that day, Warr reminded Daniels of his promise to increase Warr's workweek if business picked up,[21] stated Respondent did not need a fifth cook, and asked Daniels why a new cook had been hired and his hours reduced. Daniels had already prepared a written disciplinary warning notice with the intent of issuing it to Warr; he brushed aside Warr's comments, stated he had received complaints from several waitresses over Warr's conduct during the week following his return from his vacation, and told Warr he was issuing a written disciplinary warning notice to Warr.[22] Warr replied that during the previous week none of the waitresses indicated to him that they found his conduct objectionable and asked what waitresses complained to Daniels. Daniels refused to name the alleged complaining waitresses, handed Warr the written disciplinary warning notice he had prepared and directed Warr to sign it. Warr replied he was not signing anything without securing advice from the Union.[23] Daniels directed Warr either to sign or face discharge. Warr persisted in his refusal. Daniels told Warr he was discharged, to pick up his final paycheck the next day. Following the discharge, Daniels wrote on the notice Warr was terminated on April 11 because he "refused to sign warning—was insubordinate" after the box marked "termination" and "Jeff was terminated because of his bad attitude" under the heading "action taken." The record does not disclose when Daniels appended his comments concerning the termination.

The Respondent did not proffer any evidence explaining its reasons for hiring a new and additional cook and reducing Warr's workweek on April 10. Daniels initially[24] testified that he prepared the April 11 notice following receipt of complaints from waitresses Candy Jenkins, Patty Stobaugh, and Sabrina Sheppard that Warr, following his return from vacation, addressed them in insolent and abusive terms, was uncooperative, and that waitresses Teresa Smead, Dena Fitzgerald, and Georgia Olson later corroborated those complaints. When recalled to the stand by the Respondent after Stobaugh, Sheppard, Smead, and Fitzgerald contradicted that testimony, Daniels changed his testimony, stating waitresses Jenkins and Olson complained to him about Warr's alleged misconduct following Warr's return from vacation and the same two made a similar complaint in late March. Stobaugh testified she worked with Warr 1 day each week; that she did not make any complaints to Daniels over Warr's behavior between the time he returned from his vacation and April 11; and that on one occasion, *in early March*, she told Daniels she did not like Warr's excessive use of profanity in the kitchen. Sheppard testified she worked with Warr 2 days each week; and that she never, at any time, complained to Daniels concerning any alleged shortcomings in Warr's behavior or conduct, either before or after the time he was on vacation. Fitzgerald and Smead testified they never complained about Warr's behavior.[25] Jenkins and Olson did not testify.

It is clear the incident which precipitated Warr's discharge was his refusal to sign the April 11 warning notice; while Daniels gave additional reasons for the discharge,[26] the moving event was the refusal. An examination of five written disciplinary notices issued by Daniels in August, however, discloses that none of the employees to whom they were issued were required to sign them, and all the disciplined employees remained in the Respondent's employ after their issuance.

It is the teaching of the *Wright Line* case[27] that once the General Counsel has produced sufficient proof to support an inference that an employee's protected conduct was a factor in an employer's decision to discipline that employee, it is incumbent on the employer to show that the employee would have been disciplined absent the protected conduct.

It is clear that prior to the March 19 election won by the Union, the Respondent found no basis to complain over Warr's job performance or attitude; Daniels promoted Warr from busboy to cook in February; Daniels did not reprimand Warr in early March, when Sheppard complained to him Warr was profane; and Daniels neither reprimanded nor cautioned Warr prior to the election over any alleged shortcomings in his attitude or conduct.

Warr's strong advocacy of the Union, his solicitation of support for it among other employees, and his efforts on behalf of the Union during the campaign and at the time the election results were announced have been

[20] These findings are based on Warr's testimony which I credit on the same grounds set out heretofore.

[21] In the course of Daniels' testimony, he stated business was slow in April and the Respondent did not expect it to pick up until later in the year.

[22] At that time the notice was marked "2d warning;" stated it was issued because Warr was "being smart to the waitresses;" and stated the action taken was "warned not to do it again."

[23] In a meeting Warr and other employees attended, chaired by Union Business Representative Reshes, one of the waitresses (Mitchell) complained to Reshes over Daniels' requiring her to sign a similar notice; Reshes replied, any employees faced with the same situation in the future should refuse to sign until and unless afforded an opportunity to consult with a union representative.

[24] When called to the stand at the behest of the General Counsel to testify as an adverse witness.

[25] I place no weight on a document introduced into evidence prepared by Daniels and executed by Smead, Olson, Jenkins, and Grable following the filing of the charges in the instant case; Olson, Jenkins, and Grable did not appear and testify under oath concerning its contents, subject to cross-examination; Smead, who did appear and testify, denied she ever complained to Daniels concerning Warr prior to his discharge; the document not only was prepared and executed *after the discharge*, it contains irrelevant, scurrilous, and self-serving statements prepared by Daniels and was executed at the behest of Daniels.

[26] Warr's taking his March 29-April 3 vacation without first procuring Daniels' permission; his alleged misconduct following his return from vacation *vis-a-vis* several waitresses; his "bad attitude."

[27] 251 NLRB 1083 (1980).

chronicled above, as well as management's awareness of his activities on behalf of the Union and his strong support for it. Management's chagrin and surprise at the outcome of the election is evidenced by Shields' comments to Fitzgerald, and signaled its reaction.[28] Warr not only openly expressed his jubilation at the union victory on its announcement—before Shields, Daniels, and others—he shortly thereafter was elected to the Union's contract negotiating committee. His reprimand by Daniels on April 4, his reduction in hours on April 10, his receipt of a second disciplinary warning on April 11, and his discharge on April 11 came in quick succession after the March 19 union victory, in contrast to the treatment accorded him prior thereto, and despite his following the same procedure he had in the past prior to taking his March 29-April 3 vacation, his assurance of increased hours prior to the election, Respondent's failure to establish any waitress complained to Daniels concerning Warr prior to Daniels' issuance of the April 11 disciplinary warning,[29] and the fact other employees neither were required to sign written disciplinary notices nor disciplined for not doing so.

On the basis of the foregoing—Warr's militant support of the Union; Shields' threat to separate the "goats" from the "sheep;" Respondent's reduction in Warr's workweek without explanation and contrary to earlier representations; Daniels' disciplining of Warr on insubstantial grounds (not obtaining *his* permission before going on vacation); Daniels' second disciplining of Warr on unsupported grounds (alleged waitress complaints and proof he did not issue such discipline for an earlier, established complaint of a similar nature); Daniels' demand that Warr sign a written disciplinary notice under penalty of discharge when he neither required other employees to sign such notices nor penalized them for not doing so; and that all the above occurred after Shields' threat—I find the General Counsel established, by valid evidence, Warr was disciplined on April 4, had his hours reduced on April 10, was again disciplined on April 11, and was discharged on April 11 because of his union activities.

I further find the Respondent failed to demonstrate Warr would have been so treated even if he had not been a militant supporter of the Union.

Prior to the union election victory, Warr was promoted, praised, and the Sheppard early March complaint concerning his alleged profanity ignored; subsequent to the union election victory, Warr was singled out for discipline on April 4 for alleged failure to secure permission from the "right" management official; on April 10 his hours were reduced; on April 11 he was again singled out for discipline for alleged (and unproven) shortcomings condoned prior to the election; and the event which precipitated his discharge (refusing to sign a written disciplinary notice without advice from the Union) was a requirement neither levied on other employees issued similar notices nor a basis for discipline for failure to sign.

I, therefore, find and conclude Daniels issued a reprimand to Warr on April 4, reduced Warr's workweek on April 10, issued a written disciplinary notice to Warr on April 11, and discharged Warr on April 11 because of his union activities, thereby violating Section 8(a)(1) and (3) of the Act.

E. *The Alleged April 14 Violation*

The amended complaint alleged the Respondent violated Section 8(a)(1) of the Act by refusing to promote Kevin Knecht from busboy to cook because of his union activities. During the Union's representation campaign, Knecht signed a union authorization card and openly advocated support of the Union among other employees.

At the time Warr was discharged (April 11), busboy Mark Ussery was promoted to cook. At that time, Knecht was senior to the other busboys, including Ussery.

Knecht and Warr testified during the time they were employed by the Respondent,[30] the Respondent followed the policy or practice of promoting the senior busboys to any cook vacancies which occurred.[31]

Shields testified that at all times the Respondent followed the policy of promotion from within, but based each promotion on job performance, not seniority, unless two employees of equal ability were contenders for a promotion (in which case, the senior employee was promoted). Daniels testified if the senior employee was well qualified and mature, he was promoted, otherwise, he was not and the best qualified employee in the lower classification received the promotion. Brogan testified promotions were based on ability alone.

About a week after Ussery's promotion, Knecht asked Daniels why he, as senior busboy, had not been promoted to fill the vacancy created by Warr's discharge. Daniels replied he had not promoted Knecht to the vacancy because of his temper; Knecht acknowledged he did have a hot temper. Daniels advised Knecht if he could learn to control his temper, he would consider him for the next vacancy.[32]

I find by the foregoing that the General Counsel failed to establish Daniels gave any consideration to Knecht's union activities when he decided to promote Ussery rather than Knecht to the cook vacancy; on the contrary, Knecht acknowledged he had a quick temper when Daniels advised him that was his reason for not promoting him and he was promoted at a later date.

I, therefore, find and conclude the Respondent did not violate Section 8(a)(1) by promoting Ussery rather than Knecht to the cook vacancy created by Warr's discharge

[28] The necessity of separating "the sheep" (those employees accepting Shields' proclaimed role as their shepherd) from "the goats" (those employees who, in Shields' judgment, were leading "the sheep" astray; i.e., into rejecting Shields' paternalism and seeking and securing union representation to advance and protect their interests).

[29] In view of Daniels' shifting and contradictory testimony concerning who complained to him, the contradiction of his testimony by waitresses to whom he attributed complaints, and the failure of Respondent to produce, subject to cross-examination, the remaining two waitresses who allegedly complained, I do not credit Daniels' testimony to the effect several waitresses complained about Warr to him following Warr's return from vacation.

[30] Knecht was hired as a busboy in August 1979; Warr was hired as a busboy in June 1979.

[31] Between June 1979 and April 11, Grable, Jones, and Warr, the senior busboys at the time, were promoted from busboy to cook.

[32] Knecht subsequently was promoted to cook at the next vacancy.

and will recommend dismissal of those portions of the complaint so alleging.

F. *The Alleged April 19 Violation*

The amended complaint alleges the Respondent violated Section 8(a)(1) of the Act by reducing Sheryl Schwind's workweek from 5 to 4 days because of her union activities.

Findings have been entered above that it was Schwind who made the initial union contact; utilized her home for meetings between the unit employees and union representatives; actively campaigned for the Union, acted as the Union's election observer; appeared on behalf of the Union at the hearing scheduled before the Region on the Union's petition for certification in the presence of management; and announced a victory celebration in the Respondent's kitchen before management when the election results were tabulated.

It is undisputed that on April 10, less than a month after the election, the Respondent reduced Schwind's workweek from 5 to 4 days per week. Schwind learned of the reduction on April 13 when she reported for work and examined the posted schedule. When Schwind approached Daniels for an explanation, his reply was the reduction had been ordered by Shields.

At the hearing, Daniels testified that, while business was slow during April, he hired a new waitress in anticipation of an increase in the summer months; that he hired the new waitress at that time so he would have sufficient time to train her before the busy season started; and that to absorb the costs of an additional waitress without increasing total costs for waitresses' employment, he reduced the workweeks of the three junior waitresses (Schwind from 5 to 4 days per week; Fitzgerald from 4 to 3 days per week; and Sheppard from 5 to 4 days per week).

Sheppard contradicted Daniels' testimony, stating her workweek was cut from 5 to 4 days per week *in February*, when waitress Georgia Olson returned to work from sick leave status. Schwind testified without contradiction, at the time her workweek was reduced, she was senior to many waitresses and the workdays of a number of waitresses junior to her were not cut; i.e., Stobaugh, Jenkins, and Smead.[33]

Following the *Wright Line* test, I find the General Counsel established by valid evidence that a new waitress was hired and the workweek of union activist Schwind was reduced shortly after the election, admittedly during a slow period at the restaurant, and that Respondent failed to establish that Schwind's workweek would have been reduced if she had not been a union activist. I base this on the timing of the reduction, the paucity of Daniels' explanation to Schwind (Shields' weeding out another "goat" (?)); and Daniels' inadequate explanation.

I, therefore, find and conclude that the Respondent, by Daniels, reduced Schwind's workweek on or about April 10 because of her union activities and thereby violated Section 8(a)(1) of the Act.

[33] Smead confirmed Schwind's testimony.

G. *The Alleged Failures or Refusals To Bargain*

The amended complaint alleged that the Respondent failed or refused to bargain in good faith with the Union by changing its promotion and disciplinary policies without prior notice to or bargaining with the Union, in violation of Section 8(a)(1) and (5) of the Act.

The General Counsel asserts the Respondent's failure to notify or bargain with the Union prior to denying promotion of senior busboy Knecht to cook on April 11 constituted a change from its alleged prior policy of promoting the senior busboy to any cook vacancies and thus violated the Act.

The General Counsel relied on testimony by Warr and Knecht to the effect during their employment by Respondent, all promotions from busboy ranks to cook were granted to the senior busboy at the time the vacancy arose, to establish the existence of the alleged policy. I find that testimony insufficient to establish the policy.

I, therefore, find and conclude that the General Counsel failed to establish, by valid evidence, the Respondent changed any prior policy when Daniels failed to promote Knecht to the cook vacancy created by Warr's discharge and will recommend dismissal of those portions of the complaint so alleging.

The General Counsel asserts prior to March 19 the Respondent published and followed a disciplinary policy wherein at any point an employee's job performance did not meet management's expectations, the employees would receive:

1. A written warning . . . with an individual interview by your manager and the opportunity to speak with the director of personnel.

2. A second written warning . . . with an individual interview by your manager and the director of personnel.

3. Automatic termination.

The General Counsel further asserts on April 8 that the Respondent changed that policy without prior notice to or bargaining with the Union, when it issued a written warning to waitress Jamie Mitchell marked "second warning" and she had not received a written warning at any time during the preceding 6 months.[34]

The warning notice issued to Mitchell on April 8 contains three boxes with the printed legend "1st WARNING" after the top box; the legend "2nd WARNING" after the next; and the legend "TERMINATION" after the third. Written behind the printed legend "1st WARNING" on the April 8 notice given to Mitchell are the words "Verbal" and Daniels' initials, and an "X" is written into the box preceding the printed legend "2nd WARNING."

It is undisputed that Mitchell received an *oral* reprimand within the 6 months preceding the issuance of the April 8 written warning to her and that she did not receive a written warning within the 6 months preceding April 8.

The General Counsel contends that the above demonstrates that on April 8 the Respondent changed its disci-

[34] It is undisputed all warnings are destroyed after the passage of 6 months.

plinary policy from: a policy of not subjecting an employee to discharge unless he or she received *two written* warnings within the 6 months prior to the date of discharge to: a policy of subjecting an employee to discharge upon the receipt of *one oral* and *one written* warning *or* two written warnings within the 6 months prior to the date of discharge; and that the change was accomplished without prior notice to or bargaining with the Union.

It is undisputed that the Respondent did not notify the Union of any change in its disciplinary policy between the date the Union won the election (March 19) and April 8.[35]

Daniels testified, without contradiction, that the policy of requiring two written warnings within 6 months of a discharge was changed to a policy of requiring either one oral and one written warning or two written warnings within the 6 months preceding a discharge at all of the Respondent's restaurants in April 1979, when the contract between a sister local of the Union and the Respondent covering the Respondent's employees at its Lafayette, California, restaurant was modified to reflect that change.

I credit Daniels' testimony. I, therefore, find the warning issued to Mitchell on April 8 did not reflect a policy change and the Respondent did not violate the Act by its promulgation. I, therefore, shall recommend those portions of the complaint so alleging be dismissed.

CONCLUSIONS OF LAW

1. At all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times Dave Shields, Don Daniels, and Steve Brogan were supervisors and agents of the Respondent acting on its behalf within the meaning of Section 2 of the Act.

3. Since March 19 the Union has been the exclusive collective-bargaining agent of all employees of the Respondent employed at its Vacaville, California, facilities, excluding bookkeepers, managers, guards, and supervisors, as defined in the Act.

4. The Respondent violated Section 8(a)(1) of the Act by:

(a) Daniels' February 17 threat to Warr that the Respondent probably would have to close its doors if the employees voted for union representation;

(b) Shields' April 10 implied threat to Fitzgerald that the Respondent would discriminate against those of its employees who were union supporters and close its restaurant if its employees went on strike; and Shields' interrogation of Fitzgerald concerning her reasons for supporting the Union and her actions in the event the Union called the employees out on strike.

5. The Respondent violated Section 8(a)(1) and (3) of the Act by:

(a) Daniels' issuance of a reprimand to Warr on April 4 because of his union activities;

(b) Daniels' April 10 reduction of the workweeks of Warr and Schwind because of their union activities;

(c) Daniels' issuance of a disciplinary warning to Warr on April 11 because of his union activities;

(d) Daniels' discharge of Warr on April 11 because of his union activities.

6. The Respondent did not otherwise violate the Act.

7. The aforesaid unfair labor practices affected commerce as defined in Section 2 of the Act.

THE REMEDY

Having found the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend the Respondent be directed to cease and desist therefrom and to take affirmative action designed to effectuate the purposes of the Act. Having found the Respondent reduced the working hours of employees Warr and Schwind because of their union activities and discharged employee Warr because of his union activities, I shall recommend that the Respondent be directed to offer Warr reinstatement to his former position and workweek and to restore to Schwind her former workweek, and to make whole both Schwind and Warr for any losses they suffered by virtue of the discrimination against them, with the amounts due calculated in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon computed in accordance with the formula set out in *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Having found the Respondent reprimanded Warr on April 4 because of his union activities, issued a written warning to Warr on April 11 because of his union activities and issued a termination notice to Warr on April 11 because of his union activities, I shall recommend that that reprimand and those warnings be withdrawn and expunged from the Respondent's records. Having found that the Respondent did not violate the Act by various allegations contained in the amended complaint, I shall recommend those allegations be dismissed.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I recommend the issuance of the following:

ORDER[36]

The Respondent, El Charro Mexican Foods, Inc., Vacaville, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with closure of its business if they choose to be represented by the Union.

(b) Threatening its employees with discrimination against those employees who support or supported the Union.

[35] Union Business Representative Reshes' testimony to that effect is uncontradicted.

[36] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Threatening its employees with closure of its business if they go on strike.

(d) Interrogating its employees about their reasons for supporting the Union and their conduct in the event a strike occurs.

(e) Issuing reprimands or disciplinary warnings to its employees because of their union activities.

(f) Reducing the workweeks of its employees because of their union activities.

(g) Discharging its employees because of their union activities.

(h) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer to Jeff Warr reinstatement to his former position and workweek.

(b) Restore to Sheryl Schwind her former workweek.

(c) Make whole Sheryl Schwind and Jeff Warr in the manner set forth in The Remedy section of this Decision.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and any other records necessary to analyze and determine the amounts due to Schwind and Warr under the terms of this Order.

(e) Withdraw the April 4 reprimand and October 11 warning notice and termination notice issued to Jeff Warr and expunge same from its records.

(f) Post at its premises at Vacaville, California, copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 20, shall be signed by an authorized representative of the Respondent and posted immediately upon their receipt and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by other material.

(g) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that paragraphs 7(f), 11(a), 11(b), and 14 of the amended complaint be dismissed.

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[37] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."